

**UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD**

YVONNE E. FOUST,  
Appellant,

v.

DEPARTMENT OF THE TREASURY,  
Agency.

DOCKET NUMBER  
AT-0752-98-0633-I-1

DATE: DEC 31 1998

Yvonne E. Foust, Atlanta, Georgia, pro se.

Sheri L. Smith, Esquire, Atlanta, Georgia, for the agency.

**BEFORE**

Ben L. Erdreich, Chairman  
Beth S. Slavet, Vice Chair  
Susanne T. Marshall, Member

**OPINION AND ORDER**

¶1 The appellant has timely petitioned for review of an initial decision issued on June 25, 1998, which dismissed her appeal as untimely filed. For the reasons set forth below, we GRANT the petition for review under 5 C.F.R. § 1201.115, REVERSE the initial decision, and REMAND the appeal to the regional office for adjudication on the merits.

## BACKGROUND

¶2 The appellant was removed on March 30, 1998. She appealed the removal on May 5, 1998, asserting, under penalty of perjury,<sup>\*</sup> that she did not receive the proposed removal notice until April 4, 1998, and that she did not receive the decision letter until May 4, 1998, in the union office. Initial Appeal File (IAF), Tab 1. The administrative judge, in his Timeliness Order dated May 7, 1998, ordered the appellant to file evidence and argument, within 15 days, showing that her appeal was timely or that good cause existed for the delay. IAF, Tab 3. The appellant untimely responded on June 2, 1998, and the administrative judge rejected the submission. IAF, Tab 5. On June 1, 1998, the agency responded to the administrative judge's Timeliness Order and moved to dismiss the appeal as untimely filed. IAF, Tab 4. With its response, the agency submitted the sworn affidavit of its Labor Relations Specialist, declaring that she mailed the removal decision letter, via regular U.S. Mail on March 23, 1998, to the address reflected in the automated personnel system. The agency further contended that the letter has never been returned as undeliverable. The appellant did not respond to the agency's motion. The administrative judge dismissed the appeal as untimely filed, finding that the agency established an un rebutted presumption that the letter reached the appellant in the due course of the mails. IAF, Tabs 4 and 6.

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<sup>\*</sup> It appears that the appellant, who is pro se, mistakenly interpreted the "Appendix IV to Part 1201 - Sample Declaration Under 28 U.S.C. 1746" to be an official declaration. IAF, Tab 1. This sample declaration reads as follows: "I, [Yvonne E. Foust], do hereby declare: I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct." The appellant signed the sample declaration on May 5, 1998 and faxed it with her appeal. The Board has adhered to the principle that form will not be exalted above substance. *Strope v. U.S. Postal Service*, 71 M.S.P.R. 429, 437 (1996). The Board also has a long-standing rule of construing pro se pleadings liberally. *Melnick v. Department of Housing & Urban Development*, 42 M.S.P.R. 93, 97 (1989), *aff'd*, 889 F.2d 1228 (Fed. Cir. 1990) (Table). Thus, we will construe the appellant's declaration as a sworn statement.

¶3 In her petition for review, the appellant again asserts that she did not receive the removal decision letter until May 4, 1998. Petition for Review (PFR) File, Tab 1. The agency has responded to the appellant's petition for review. PFR File, Tab 3.

### ANALYSIS

¶4 Under the regulations, an appeal must be filed within 30 days of the effective date, if any, of the action being appealed, or within 30 days of the date the agency's decision letter was received, whichever is later. 5 C.F.R. § 1201.22(b). The appellant has the burden of proving by preponderant evidence that her appeal was timely filed. 5 C.F.R. § 1201.56(a)(2)(ii). Under the facts of this case, we find that the appellant timely filed her appeal.

¶5 As the administrative judge stated, evidence that a letter was sealed, properly addressed, and deposited in the U.S. Mail with postage prepaid gives rise to a rebuttable presumption that the letter reached the addressee in due course of the mails. *See* IAF, Tab 6 at 2 (citing *Stracquatano v. Walkama*, 54 M.S.P.R. 529, 532 (1992)). Direct evidence, however, is required to invoke the presumption of delivery and receipt. *Pogue v. Office of Personnel Management*, 41 M.S.P.R. 693, 697 (1989). Direct evidence may be in the form of a document or testimony. *Walsh v. Office of Personnel Management*, 77 M.S.P.R. 494, 498 (1998).

¶6 We agree with the administrative judge that the agency's sworn affidavit is sufficient evidence to raise the presumption of delivery and receipt. We do not, however, agree with the administrative judge's finding that the appellant failed to provide sufficient evidence to rebut the agency's presumption. The appellant made a sworn declaration that she did not receive the decision letter until May 4, 1998, and further certified to the truthfulness of this statement when she signed her name on the appeal form. *See Ford v. Office of Personnel Management*, 69 M.S.P.R. 73, 76 (1995) (Board considered appellant's signature on appeal form as evidence of the truthfulness of her claim that her untimeliness was due to the

delayed delivery of the Office of Personnel Management's reconsideration decision); *Connelly v. U. S. Postal Service*, 35 M.S.P.R. 614, 616 (1987) (Board found appellant's claim that he did not receive the initial decision until a certain date was corroborated by his affidavit and an undated letter). With her petition for review, the appellant submits a letter stating that she "did not receive [the] removal papers until [she] came back to work and [her] union steward went to Labor Management Relations, in which they said they had mailed [her] a copy." PFR File, Tab 1, Letter dated June 2, 1998. She states, however, that the letter was mailed to an old P.O. Box rather than her new address, an address which her manager allegedly had a copy of in her employee folder. *Id.* The agency has not rebutted the appellant's argument that it had a copy of her new address.

¶7 We also note that the address used on the removal decision letter, as well as the proposed removal notice, is that of the appellant's place of employment. IAF, Tabs 1 and 4. There is no evidence of mailing to the address of record as asserted in the agency's affidavit. Although the record does not reflect whether the appellant was on duty from March 23, 1998 (the date the decision letter was allegedly mailed) to May 4, 1998, the agency has not alleged that the appellant should have received the decision letter earlier at her place of employment.

¶8 Under the totality of the record, we find that the appellant has submitted sufficient evidence to overcome the agency's presumption of delivery and receipt. Thus, we find that the appellant timely filed her appeal in accordance with 5 C.F.R. 1201.22(b) by filing within 30 days of receipt of the agency's decision letter.

ORDER

¶9 The appeal is REMANDED to the regional office for adjudication on the merits.

FOR THE BOARD:

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Robert E. Taylor  
Clerk of the Board

Washington, D.C.